Chapter 8: Solution-focused hearings for older persons

8.1 Introduction

In the foreword and elsewhere in the Guide to Solution-focused Hearings in the Mental Health Tribunal (the guide), it is acknowledged that the first edition was intended to be a starting point that would evolve based on the input of Tribunal members and key stakeholders and our experience of how the *Mental Health Act 2014* (the Act) works in practice.

In particular, it was recognised that a generic guide could not address the needs of all consumers and that it needed to be enhanced to explore solution-focused hearings for particular groups of consumers. One of the groups identified as a priority for initial review were persons over 65 years of age (referred to in this Chapter as older people or persons).

Accordingly, this chapter focuses on how the Tribunal can improve the experience of older persons who are the subject of Tribunal hearings.

8.2 Methodology

As with Chapter 7, which explores solution-focused hearings for young people, as a first step in exploring the needs of older people, the Tribunal prepared an issues paper to identify some of the concerns surrounding Tribunal hearings for older people, their families and support people.

The issues paper was released for targeted consultation and submissions were received from Mental Health Tribunal members, Victoria Legal Aid and the Office of the Chief Psychiatrist. Professor Daniel O'Connor, Deputy Chief Psychiatrist Aged Persons Mental Health also reviewed a final draft of this Chapter. In addition, Tribunal representatives attended a state-wide meeting of the aged persons mental health leaders' network to discuss the issues identified and consulted with the Tribunal Advisory Group (TAG) made up of consumers and carers.

This Chapter starts by exploring the profile of older persons who have had Tribunal hearings as well as how we define 'older person.' Particular issues affecting older people are then discussed. These include physical health issues, sensory deficits, dementia, social isolation, loss and grief and stigma. The Chapter then outlines practices and strategies that can be adopted in hearings for older people in three main phases of the hearing process, namely: preparing for the hearing, conducting the hearing and concluding the hearing / delivering the decision.

8.3 Statistical snapshot

Over the first two-and-a-half years of its operation (1 July 2014-31 December 2016) a total of ten percent of hearings were for people over the age of 65. A breakdown of the percentage of these ten percent who were between 65-69, 70-74, 75-79 and over 80 respectively is provided in the table below.

The table also shows that 64 percent of older persons attended their hearing (higher

than the average attendance across all age groups of 56 percent) but only 11 percent had legal representation (compared with a representation rate across all age groups of 15 percent).

	Total hearings by age group		Did patient attend hearing?				Did patient have legal representation?			
			Yes		No		Yes		No	
	Number	% of all hearings conducted	Number	%	Number	%	Number	%	Number	%
65-69	654	4%	417	64%	237	36%	71	11%	583	89%
70-74	420	2%	297	71%	123	29%	46	11%	374	89%
75-79	274	2%	173	63%	101	37%	29	11%	245	89%
80+	383	2%	225	59%	158	41%	38	10%	345	90%
Total	**1731**	**10%**	**1112**	**64%**	**619**	**36%**	**184**	**11%**	**1547**	**89%**
All ages	**17954**	**100%**	**10102**	**56%**	**7852**	**44%**	**2765**	**15%**	**15189**	**85%**

Nearly half (45%) of hearings for older people were conducted at one of the six aged persons mental health services (namely Broadmeadows Aged, Sunshine Hospital Aged, Normanby House, Caulfield Aged Psychiatry Services, Peter James Centre and Kingston Centre). Finally, more than 80 percent of older patients had one of the following four diagnoses: schizophrenia, depressive disorders, schizo-affective disorder and bipolar disorder.

8.4 Who is an older person with mental illness?

It is acknowledged that people age or experience the effects of aging at different points in their life. SANE Australia (SANE) reports that:

> Although older age is usually defined as 65 years and above, the needs of older Australians living with mental illness can be different to the general population. Older people with mental illness are more likely to have multiple physical health conditions, cognitive impairments and few supports, and to experience financial difficulty. These factors contribute to an increased likelihood of needing supported accommodation or experiencing the effects of ageing much sooner. These factors also lead to severely reduced life expectancy; people living with mental illness live on average 25 years less than the general population.1

Similarly, people living in disadvantaged communities may also require support services typically needed by older people before the age of 65 years. As the Australian Bureau of Statistics (ABS) reports:

> Particular groups (notably Aboriginal and Torres Strait Islander people) can require various services at a younger age. One in four people aged 70 years and over plus Aboriginal and Torres Strait Islander people aged 50-69 makes some use of aged care. While most remain in their own home and use community care, one in ten uses a residential care facility.[2]

While this chapter focuses on people over the age of 65 years, it is preferable to avoid a rigid adherence to age-specific classifications and to adopt a flexible approach when responding to the diverse support needs of people with age-related conditions and mental illness.

8.4.1 Particular issues affecting older people

> The Tribunal has an important role to play in promoting and protecting the rights of older people subject to compulsory mental health treatment. Older people experiencing mental health issues, mental illness and compulsory treatment are often more vulnerable to social isolation, poverty, emerging cognitive impairments, family violence and physical health issues than other cohorts.[3]

While the circumstances affecting particular individuals will vary, certain issues, such as those identified in Victoria Legal Aid's submission in the quotation above, plus ambulation difficulties and sensory deficits, tend to disproportionately affect older people accessing mental health services.

The particular issues of physical health, dementia, social isolation, loss and grief, stigma and older persons from immigrant communities are explored further below. Issues relating to ambulation and sensory impairment are addressed in section 8.5.1 'Preparing for a Tribunal hearing' and the issue of family violence / elder abuse is discussed in the section on the role of carers and support people in 8.5.2.

The Tribunal is expected to take a holistic approach in hearings. This means that the Tribunal should explore the individual needs and circumstances of the older person, not just their mental illness and the legal criteria set out in the Act. This may include exploring with the older person and support people the issues identified below and how they can be addressed.[4] As a first step it is important for the Tribunal to be aware of the common issues that can affect older people.

It is important to note, however, that the issues described below may not necessarily be present in all (or even most) cases and that equally there may be other important issues affecting older people. Submissions to the Tribunal emphasised that older people are not a homogenous group and that the Tribunal must be 'vigilant to ensure that its findings are properly grounded in evidence, rather than age-based assumptions and stereotypes.'[5] As one Tribunal member put it:

> Each occasion is different and we should never assume that just because a person is older that they do not have the capacity or intellect of others…
>
> We should not assume that older people do not have the same needs for love, companionship, sexual closeness as people in their younger years. Equally, we should not assume that older people do not have an interest in other aspects of life, e.g. travel, the arts, work and socializing.[6]

Physical health

A SANE study conducted with the aim of better understanding the lived experience of older people with mental illness reports physical health was one of the main issues older people and their support people identified as affecting their quality of life.[7] Sixty percent of respondents reported that the medication they take for their mental illness had an unwanted effect on their physical health. Similarly, mental health practitioners confirmed that treatment for physical illnesses can adversely affect a person's mental health condition,[8] for example, medication-induced confusion or delirium. Sometimes it is not entirely clear whether symptoms such as confusion or delirium are due to mental illness or a medication for a physical illness.

Exploring physical health issues in Tribunal hearings

Given the importance of physical health to the wellbeing of people with mental illness and the Act's explicit recognition of holistic responses to the needs of people receiving mental health services,[9] critical information concerning a person's physical health should form part of the clinical report the treating team prepares before every Tribunal hearing. As well as requiring details about the mental illness the Tribunal's template for the Report on Compulsory Treatment asks services to specify 'other relevant medical issues or relevant history' and 'all current medications (psychotropic and general)' The Tribunal's expectation is that these sections of the clinical report include information about the older person's history of physical illness, the effects of anti-psychotic and similar medication on physical health and a detailed breakdown of medications taken for both physical and mental illness.[10]

This information is also important for the Tribunal to be able to satisfy itself that particular symptoms are the result of mental illness rather than a physical illness. Section 8.5.1 of this chapter discusses the clinical report in more detail. Accordingly, the Tribunal should explore any physical health issues affecting the older person as part of adopting a holistic approach. In particular, the Tribunal should ask about:

- the interaction of physical health conditions with the older person's mental illness (for example, could some symptoms be the result of the physical health rather than mental health condition?)

- whether side effects of medication for their mental health condition have an unwanted effect on their physical health or whether side effects of their medication for their physical health condition have an adverse effect on their mental health condition.

Dementia

In considering the particular needs of older people it is important to keep in mind that, in Tribunal hearings for someone with dementia, it can be difficult to distinguish between depression and dementia. As Beyond Blue notes:

> Depression is thought to affect 1 in 5 people experiencing dementia.
>
> When dementia and depression occur at the same time it may be difficult to distinguish between them because the signs and symptoms are similar. However, dementia and depression are very different conditions that require different responses and treatment, so a thorough assessment by a health professional is recommended.[11]

Another difficulty is that the symptoms of dementia can interfere with the ability of older persons to participate in hearings.

Tribunal hearings for older persons with dementia

Due to these complexities, it is preferable to adopt a particularly low key, informal approach when conducting a hearing for a person with dementia. Tribunal members should take special care to use clear and concise language and short sentences.[12]

Various stakeholders also expressed views about the use of video-hearings for older persons generally but particularly those with dementia. The use of video hearings for older people generally is discussed further in 8.5.2 'Conducting a hearing.'

Finally, when an older person has dementia and their symptoms limit their ability to

participate in the hearing, the participation of a carer, nominated person, lawyer or advocate is likely to be particularly important. Services can play an important role in encouraging this cohort to obtain legal representation or advice prior to their Tribunal hearing.

Social isolation, loss and grief and stigma

Recent research by SANE also points to social isolation, loss and grief and stigma around mental illness as issues which disproportionately affect older persons. The Tribunal should be aware of the potential impact of these issues when conducting the hearing. This is consistent with holistic and recovery oriented approaches which are central features of solution-focused hearings (see 2.5 and 3.3 of this guide).

Thirty-one percent of the respondents to the SANE report saw social isolation as a major concern for their future. As SANE reports:

> Researchers increasingly understand isolation as a contributing factor to ill health and early death. It should therefore be a focus of all discussions to improve the care and support provided to older adults living with mental illness.[13]

Similarly the experience of loss and grief was a major issue for older people participating in the study, with 72 percent reporting that their symptoms changed as they became older: 48 percent experienced feeling more depressed and most attributed this to loss and grief:

> Older adults living with mental illness experience loss in relation to issues such as independence, status, death of a loved one, and financial stability. The stress associated with many of these losses may contribute to depression in later life.[14]

However, as SANE observes:

> Depression is not a normal part of ageing, and yet this assumption can prevent health professionals and care workers from identifying older people who are not coping.[15]

The higher incidence of depression is complicated further by stigma. As Beyond Blue reports:

> Many people over 65 still seem to feel there is a stigma attached to depression and mental health conditions, viewing them as a weakness of character rather than a health problem.
>
> Older people are also more hesitant to share their experiences of depression with others, often ignoring symptoms over long periods of time and only seeking professional help when things reach crisis point.[16]

For older people the dual stigma of age and mental illness is pervasive and can affect all aspects of a person's life. SANE reports it can also limit the services an older person receives:

> Stigma is a huge issue for this group, and it prevents people from being given adequate care. This group is most often likely to need help, but less likely to be provided with this help.[17]

Exploring sensitive issues such as social isolation, loss and grief etc

The Tribunal should endeavour to understand an older person's life circumstances, which may include social isolation, grief and loss, by discussing strategies for sensitively exploring those issues while taking into consideration the persons present

at a hearing (for example relatives) and recognising that the older person may be embarrassed or too uncomfortable to discuss such issues. Even if it is not possible or appropriate to discuss certain sensitive issues, the Tribunal may be well placed to explore what community support may be available to support the older person with these issues if that is their preference.

Despite the fears they hold for their future, 67 percent of the older people with mental illness surveyed by SANE had not spoken with their carer or support person about a plan for their future care. This was the case even when those surveyed were cared for by an older parent or sibling.[18] For this reason, if the older person is at the hearing the Tribunal should explore their preferences around their mental health treatment and care (including their living arrangements) with them. Similarly, the Tribunal should request that the treating team outline the current wellness and recovery plan, describing how the person's treatment preferences for their current and future care are being addressed.

Immigrant experience

Victoria Legal Aid's submission highlights particular challenges that older persons from immigrant communities may face:

> Our aging population includes immigrant communities, many of whom migrated to Australia as adults following World War 2 and who may not be fluent in English. Elderly women migrants in particular may have lived within their families and migrant communities for most of their lives in Australia and not had opportunities to participate in the Australian community more broadly. They are profoundly disadvantaged when exposed to the mental health system. There is a myriad of issues around traditional gendered roles of older people and other cultural norms that may not sit well with the prevailing model of disclosure and treatment of mental illness within our health system.[19]

Similarly, a psychiatrist member of the Tribunal stated that people from immigrant communities may have been subject to:

> …significant stressful background events such as war-time experiences, deprivations, deportations, family losses, racial or religious discrimination, immigration experiences and coping with financial disasters … [as well as] actual or suspected financial and / or physical abuse.[20]

Exploring issues relating to migration

This is another area in which Tribunal members need to demonstrate sensitivity and compassion in their questioning, being careful to explore only that which is relevant for the person and for the decision that the Tribunal is required to make. The Tribunal should be mindful of the older person's distress and monitor how well they are tolerating and / or understanding the questioning. [21]

The importance of professional interpreters for this cohort of older people cannot be overstated and is discussed further in the next section of this Chapter regarding preparing for the hearing (8.5.1).

8.5 Practices and Strategies in hearings for older people

In this section we outline more practices and strategies that can be adopted in hearings for older people in the main phases of the hearing process, namely: preparing for the hearing, conducting the hearing and concluding the hearing / delivering the decision. These practices relate both to the Tribunal and to the treating team who has a vital role in assisting older people to prepare for their hearings and in preparing the clinical report before the hearing.

8.5.1 Preparing for a Tribunal hearing

In their study of the practices of mental health tribunals in Victoria, New South Wales and the Australian Capital Territory, Carney et al identified that patients, families and carers have limited understanding of the role of mental health tribunals and are often unprepared for Tribunal hearings:

> For the client to have a greater role in participating in the hearing, and for this to be a useful experience, it appears that informing the person in clear terms about what to expect at a hearing is essential. This involves not only outlining the criteria but also being clear as to how these may be discussed, what type of experiences are important to highlight, along with what questions and concerns are appropriate to raise. Having assistance to reflect on these issues and what might be helpful for the client in terms of their future treatment and/or access to resources, as well as how they can be aided in telling their story before or on the day of the hearing would benefit from attention.[22]

This section of this chapter explores ways of improving preparation for Tribunal hearings, focusing on the clinical report, the treating team's role in explaining the clinical report and hearing processes and addressing specific needs in relation to mobility and sensory difficulties.

The importance of including the right information in the clinical report

The clinical report is the key document the treating team must prepare before Tribunal hearings. The Act requires the service to give patients access to this report and other documents in connection with the hearing at least 48 hours before the hearing.

Submissions focused on both the content of this report, the timeliness of giving it to the older person and how it is explained to them and / or their carers / nominated person as appropriate.

With respect to the content of the report on compulsory treatment, the template contains questions about the person's current social circumstances (including social stressors, relevant family and development history), other relevant medical issues or history and all current medications (psychotropic and general).

Nevertheless, submissions to the Tribunal indicated that it would be beneficial for services to include more information on these issues in reports about older people. A good history is important. As a practitioner at the meeting of the aged persons mental health leaders' network put it, 'we can't treat people in the future if we don't know about the past.'

Victoria Legal Aid submitted that:

> It would be beneficial for the report to include commentary on any relevant history of physical illness, effects of antipsychotic medication on physical health, social isolation, grief or loss or other issues being experienced by the older person. It would

> also be useful for the report to include a more detailed breakdown of medications taken for both physical and mental illness.[23]

Treating team's role in explaining the clinical report and the hearing process

The Tribunal's Practice Note on Access to Documents in Tribunal hearings makes it clear that the Tribunal considers there is:

> a positive obligation on the service to facilitate patient access to information in the clinical report which can include the provision of an interpreter or other assistance the patient requires in order to understand the contents of the clinical report.[24]

This is also required under section 8 of the Act, which requires the contents of any advice, notice or information given to the person to be explained:

> to the maximum extent possible to the patient in the language, mode of communication and terms which the patient is most likely to understand.[25]

In the case of older people, assisting them to read and understand the report could include providing the report in large print or including a simple summary at the beginning.[26] To properly explain the report to an older person, the treating team may need to have several sessions with them, meaning that the process should start well before the 48-hour minimum timeframe.[27]

This means that the practice adopted in some services of having the interpreter engaged for the hearing translate the report to the person just prior to the hearing is not desirable and should be avoided in all but the most urgent cases. It is a fundamental rule of procedural fairness that the person have an opportunity to prepare for their hearing. The Tribunal can adjourn a hearing if it has concerns that the person has not had adequate opportunity to read the clinical report (and / or have it explained to them).

More generally, while written Tribunal and other resources are available to explain Tribunal processes, service staff are usually best placed to explain the process to the older person and their support people before the hearing. Participants in the meeting of the aged persons mental health leaders' network commented that it is very important for the treating team to explain what the hearing is for and that the person is 'not going before a judge to be convicted.' This explanation is particularly important when it is an older person's first hearing, when the process is unfamiliar and when they may be very unwell. As one participant in the meeting of the aged persons mental health leaders' network put it, some older persons are petrified: 'they think they'll be shot.'[28] Other participants at the same meeting commented that if the hearing goes badly because the patient has not been properly prepared for it (for example, if they do not understand what the Tribunal is there to decide), the hearing can be an upsetting experience for the treating team, family members and support people but most of all for the older person.[29]

Specific ambulatory and sensory needs[30]

Older people are generally more likely than the younger population to have special needs in relation to mobility and hearing or sight impairment. The Tribunal should be made aware of and prepare for such needs before the hearing to avoid any delay in commencement or any embarrassment or stress for the older person.

Mobility

For mobility issues it is important that the treating team enable the person to attend the hearing and for community patients that might mean organizing transport to and

from the hearing. Wheelchair / mobility aid access should be facilitated and the Tribunal should be informed if a person will be attending in a wheelchair or other mobility device so that preparation for adequate space can be assured prior to the person entering the room.

Preparation for sensory impairment

For people with hearing loss, low or no vision, it is essential to recognise that each person's needs will be individual to their specific abilities and preferences. These abilities and preferences should be communicated to the Tribunal in advance and verified with the person at the start of the hearing.

Hearing impaired

The Tribunal understands that all aged mental health services should have access to headphone and microphone sets for use by hearing impaired people. In addition, people with low hearing will generally need to be able to have clear vision of the speaker and be able to see his or her lips moving. Position may be important as the older person may favour one ear over the other and therefore the Tribunal should be flexible about seating arrangements (see case study on 'Jimmy' below). Care should be taken to ensure that the full conversation is heard, not just the questions directed to the person. It may be appropriate to have someone seated next to the person such as a clinician, family member or support person (someone with a familiar voice) to repeat what is being said and / or for the Tribunal to adjust its seating to be closer to the person.

If an Auslan (sign language) interpreter is required, it is important to remember that two interpreters will often need to be booked as Auslan interpreters can only interpret for limited periods of time before a break is required or before needing to swap with another interpreter. Using Auslan interpreters requires the same oversight as mentioned in the section below under 'Importance of professional interpreters'.

Vision impairment

As previously stated, it will be important that the person with vision impairment has access to written material in large print and / or has the relevant material read to them. The Tribunal should check that this has occurred at the commencement of the hearing and if it has not, deal with this issue accordingly.

Notwithstanding the fact that all parties will have introduced themselves, depending on the person's ability to see, it might be necessary for the Tribunal to state their name on each occasion before they speak and when speakers change, for example: 'this is Helen, the community member…' All participants should be prompted to do this.

Some people with age-related vision impairment such as macular degeneration, might look like they can see you as, after a lifetime of having vision, they will automatically 'look' at you when you are speaking and it is therefore easy to forget or minimise the sight impairment. Additionally, without sight a person does not have the visual clues to aid communication such as seeing facial expressions, gestures and hand movements so it is vital that the Tribunal monitor the proceedings with this in mind.

People with vision impairment are easily startled by sudden movement or loud noise so this should be avoided at all costs and explanation given prior to any movement, for example; 'this is Mary, the legal member, I am handing over the document explaining our decision today…' or 'we are about to break to discuss our decision.

Everyone here other than the Tribunal is going to leave the room…'

During hearings for people with either hearing or vision impairment, the Tribunal should check in regularly to ensure the person is following and understanding the proceedings and, of course, the eventual decision of the Tribunal.

8.5.2 Conducting a hearing

Engaging older persons in hearings

Carney et al reported that:

> The hearing is very stressful for consumers, exacerbated by their mental illness. Many used terms such as trial, punishment, powerlessness and intimidation…[31]

> There was some criticism [of] placing too much emphasis on the medical perspective and being unable to perceive the social and emotional viewpoint of consumers.[32]

In order to demonstrate that the Tribunal is responsive to the views and preferences of the older person (and more generally), an increasingly common practice in hearings is for the initial focus in a hearing to be on the person's views, preferences, social and community support, before the focus of the hearing shifts to the person's mental health and wider discussion with the treating team. Of course if an individual seems to find this approach confronting, the discussion might start with the treating team or with a carer / family member. As one Tribunal member commented, asking the person about their circumstances can be embarrassing for some people and can raise privacy issues.[33] (See, also, discussion in the section on exploring sensitive issues 8.4.1).

Submissions emphasised the need to take extra time in hearings involving older people to ensure that they understand what is happening. However, it is equally important not to 'talk down' to the person. As members observed:

> We should be kind, gentle and slow things down. Older people should not be rushed but also we should not be condescending in our manner. Respect for the person should be demonstrated at all times … [e.g.], addressing them with their full title: Mr, Mrs, Ms, Dr etc., if this is their preference.[34] (Tribunal member, community)

> Hearings may be more time-consuming because of the need for extra attendees, interpreters (elderly [people] from non-English speaking background[s] can be less proficient regarding technical terms even if they can speak English), handicaps due to attentional [sic] difficulties and sensory deficits. Time should be allowed for repetition of information and questioning and confirmation that material has been understood.[35] (Tribunal member, psychiatrist)

Tribunal members should always introduce themselves at the start of the hearing but simplifying introductions and the explanation about the hearing process may be desirable in hearings involving older people.[36] As Victoria Legal Aid submitted:

> … [I]t can be helpful for the Tribunal to dispense with formalities when dealing with older people. In our experience, consumers are often stressed by the hearing process and consequently unable to quickly and easily process information. In these situations, it is important that the Tribunal explains the hearing process simply and makes the forum appropriately informal in order to reduce stress.[37]

Case study: Jimmy

Jimmy was an elderly man experiencing his first admission to an inpatient facility. English was not his first language and he was partially deaf and very anxious about his hearing. He did not believe he had a mental illness and did not believe he required ongoing treatment.

The Tribunal put him at ease by acknowledging his age and great life experience and by explaining things simply and easily and answering questions as they arose. The Tribunal also rearranged the configuration of the hearing room so that the atmosphere was more conversational. This included seating Tribunal members next to him to maximise his ability to hear and participate in the hearing. It led to a stronger more robust discussion of the issues during the hearing. Jimmy indicated that he was very appreciative of the way the hearing was conducted. He felt listened to, involved and respected.[38]

A number of submissions emphasised the importance of advance statements and other tools that can support older people to prepare for discussions and make or participate in decisions about their treatment for mental illness.[39] The treating team has a role in telling the person about such supported decision making mechanisms well before the Tribunal is involved. However, the Tribunal can also promote their use during the hearing.

By according significant weight to the input of a nominated person and the content of an advance statement the Tribunal can promote supported decision making. Alternatively, if a person does not have a nominated person or advance statement, the Tribunal may suggest 'flagging these as something they may want to consider and discuss with their treating team in the future.'[40] As Victoria Legal Aid stated:

> While it is not the role of the Tribunal to direct the use of tools such as advance statements, there is scope for decision-makers to discuss and promote the use of these tools in the context of Tribunal hearings.[41]

Role of carers, support people

As noted elsewhere in this guide, the Act promotes the recognition of and respect for the central role of carers and support people,[42] and the Tribunal encourages the participation of family and other support people in Tribunal hearings involving older persons (as it does in hearings of people of any age).

However, the participation of support people should not be at the expense of the voice of the person. As people age, there is 'increased potential for older people to become marginalised in … hearings as their carers take up a more active role:'[43]

> Many age-based assumptions made about older people are grounded in a "best interests" model that may conflict with the wishes and preferences of the older person themselves. In the context of the provision of mental health treatment and Tribunal hearings, there is a very real risk of deferring to the opinions of family and carers where the older person receiving treatment may already be experiencing a profound loss of control over their life.[44]

The Tribunal should also be aware of the stress that carers are often under and the potential for elder abuse (a form of family or domestic violence or exploitation that is experienced by older people).[45] This phenomenon is increasingly common and has multiple forms that go beyond physical and financial issues and extend to emotional and psychological abuse and neglect.[46] As one recent study states:

> …the extent of elder abuse is sufficiently large that social service and health professionals who serve older adults are likely to encounter it on a routine basis.[47]

Victoria Legal Aid reports that this is a particular issue for elderly women and notes that:

> It is highly problematic when the partner in the relationship is used as the primary source of information or is treated as the person's carer by the treating team, with no acknowledgement of the dynamic of gender based violence and control occurring in the relationship.[48]

In light of these issues it is preferable that the Tribunal speak with the older person directly whenever possible rather than defer to the older person's support people. As a corollary, it is important to remember that input from the older person's carer or family members sits alongside rather than replaces the older person's view. When raised by the treating team or advocates or identified by the Tribunal, any concerns about abuse or power imbalances need to be handled sensitively on a case-by-case basis.

Case study: Maria

Maria is 68 years old and has been involved with the mental health system for many years. Recently she has been in and out of hospital and subject to compulsory treatment. Maria's husband attends all appointments and treatment meetings with her. Maria is not confident speaking in English; however her husband is confident and speaks English well. Maria's husband also contacts the Crisis Assessment and Treatment Team, leading to Maria's admissions into hospital. Maria is rarely provided with an interpreter as staff communicate with her in English. Maria's husband often speaks with the treating team about his preferences for her mental health treatment and this appears to inform their decisions about her medication and discharge planning. Maria has told her lawyer that she sometimes doesn't understand what the treating team is saying. It is clear that she relies on her husband to explain what the treating team is saying. However, he often doesn't tell her or simply tells her she is sick and needs to take medication she is given. Maria has stated her husband gives her the medication and that the psychiatrist asked him to do this to ensure she takes it; she states her husband sometimes does not give it to her. Maria does not know what the medication is and she often feels physically sick from it.

Maria has spoken to her lawyer about the family violence that began in the relationship over 40 years ago. Maria has said she is scared to ask that her husband not attend meetings with her and also feels she has not had a chance to tell the treating team what she wants. Maria also told her lawyer that during Mental Health Tribunal hearings her husband often answers for her and stated he was her carer despite the fact that she does all the housework and caring at home, even when she feels unwell. No interpreter was used as Maria's husband insisted he could assist her and Maria was afraid to insist that she needs one. Maria stated she feels her views are dismissed as she has bipolar and is perceived to not know what it is she needs. Instead her husband is referred to as the expert in her treatment.[49]

Importance of professional interpreters

The case study of Maria highlights the need for independent, professional interpreters. When notified of the need for an interpreter, the Tribunal's policy is to engage independent, qualified interpreters for hearings (including for the interpreter to be available for fifteen minutes before and after the hearing). Where a service has not identified the need for an interpreter but it becomes clear that one is required, the Tribunal may be able to arrange a telephone interpreter at short notice or exercise its discretion to adjourn the hearing so that an interpreter can be arranged.

When using an interpreter, Tribunal members must be mindful that they are speaking with the older person who is the subject of the hearing. Questions and conversation

should be addressed directly to the older person and not to the interpreter in the third person. Tribunal members must also ensure that everything, i.e. all conversation regardless of who it is directed to, is interpreted, leaving time for the interpreter to both understand the content of the conversation and then relay it in the required language.[50]

Ultimately, professional, independent interpreters should be used wherever possible in discussions with the treating team about the report and the hearing to ensure that the person is able to fully participate.

Video-conference hearings

In 2015-16 approximately one quarter of Mental Health Tribunal hearings were conducted via video-conference.[51] Views about video hearings for older people were somewhat mixed but a common view expressed was that video hearings should be avoided, if possible, for persons with dementia. One Tribunal member commented that:

> [Video hearings] can be very confusing; talking to the TV is not normal and might cause unnecessary distress. One elderly person at a video hearing was convinced that he was being filmed because he saw his image in the corner of the screen at his end.[52]

Another member mentioned the difficulty of video hearings for older persons with age-related hearing and visual impairments as well as their lack of familiarity with technology.[53]

In contrast, a participant at the meeting of the aged persons mental health leaders' network with whom others agreed commented that the quality of the video conference connection with the Tribunal is very good and that older people do not have as many difficulties with video conference hearings as anticipated. A video conference hearing with the key people present is preferable to an in-person hearing that is missing key people.[54]

Victoria Legal Aid took the view that hearings for older people should always be conducted in-person, stating that:

> Video hearings can prevent older people from engaging fully with Tribunal members, leading to misunderstandings about a person's personal circumstances, life history and treatment preferences. In addition to mental illness, older people may also be experiencing difficulties with hearing and visual impairments, making communication via video conferencing challenging.[55]

Victoria Legal Aid also had particular concerns about video-conference hearings for urgent ECT applications.[56]

The Tribunal's approach to video hearings for older people

The Tribunal acknowledges concerns about video-conference hearings for older people and has recently altered its hearing schedule so that most hearings at aged mental health services are held in-person rather than by video-conference. However, not all hearings involving older persons are held at these services and it is not possible to conduct in-person hearings in all cases involving older persons whether at aged services or otherwise.

As stated in the Tribunal's 2015-16 Annual Report:

> The Tribunal favours conducting hearings in-person; however, it is not possible for the Tribunal to conduct hearings at the full range of places and times its services are

> required without the use of video-conference connections. The capacity to conduct video-conference hearings is also critical to the Tribunal being able to hear matters quickly and flexibly.[57]

Nevertheless, if particular concerns about a hearing via video-conference are identified prior to the hearing being listed, the Tribunal's registry may be able to convene an in-person hearing.

Alternatively, if there are issues with an already listed video-conference hearing that make it difficult for an older (or any) person to participate in their hearing, a Tribunal division may exercise its discretion to adjourn the hearing to an in-person division. However, due to the restrictions on the Tribunal's power to adjourn hearings, this will not always be possible.

8.5.3 Concluding hearings

> Consumers were often confused about what the tribunal had decided… Some consumers wanted to be able to discuss or clarify the decision but did not feel they had an opportunity to do so. (Carney et al)[58]

While the above quotation referred to consumers in general, it is especially true of particularly vulnerable groups of people such as younger and older persons. Participants at the meeting of the aged persons mental health leaders' network felt that the level of explanation following hearings (and by whom) needed to be decided on a case-by-case basis. In Victoria Legal Aid's view, as in all hearings, the Tribunal should take the time to explain the decision to older persons in easy and understandable language, noting that this may include 'answering questions that may seem irrelevant to the Tribunal process but are important for the older patient.'[59]

Tribunal members are provided with guidance as to how to deliver their decisions using plain language that is clear, articulate and appropriately concise so that participants understand the decision and the reasons for it. Having regard to all the circumstances of the case, particularly the older person's cognitive level and general level of understanding, members should take particular care to ensure that they clearly explain the decision to the older person and allow some time for answering questions following the decision.

8.6 Conclusion

A solution-focused approach is not about miscasting the Tribunal as the 'source of solutions'. Instead, the approach aims to engage participants in hearings as active partners in the discussion and decision-making process of the Tribunal. Solution-focused techniques complement many of the reforms included in the Act, particularly those reforms that promote a person's right to autonomy, self-determination and supported decision making.

Drawing on the experience of the first three years of the Tribunal's operation and the invaluable input of members and stakeholders, this Chapter has explored the complex issues that can hinder or prevent older persons actively participating in hearings. It also contains practical guidance as to how these issues can be addressed and how hearings can be improved for this particular group of consumers.

[1] SANE, 2013, *Growing older, staying well mental health care for older Australians*, 1.
[2] Australian Bureau of Statistics (ABS), Year Book Australia, 2012.
[3] Victoria Legal Aid, *Solution-Focused Hearings with Older People*, Submission to the Mental Health Tribunal, 27 June 2016, 2.
[4] See 2.5, 'Holistic Approaches.'
[5] Victoria Legal Aid, above n 3, 4.
[6] Tribunal member (community), submission dated 20 May 2016.
[7] SANE, above n 1, 3.
[8] Participants at the meeting of the aged persons mental health leaders' network on 28 June 2016.
[9] Section 11(1)(f) *Mental Health Act 2014.*
[10] Victoria Legal Aid, above n. 3, 7.
[11] Beyond Blue, https://beyondblue.org/resources/for-me/older-people/signs-and-symptoms-of -depression-in-older people. (As at September 2015).
[12] Tribunal member (community), submission dated 20 May 2016. A carer on the Tribunal Advisory Group (TAG) similarly stated that when an older person has dementia the Tribunal should 'disregard formal introductions and explain gently and simply what the process is about.'
[13] SANE, above n 1, 8.
[14] Ibid.
[15] Ibid.
[16] Beyond Blue, https://www.beyondblue.org.au/resources/for-me/older-people. (As at September 2015).
[17] SANE, above n 1, 9.
[18] Ibid.
[19] Victoria Legal Aid, above n 3, 4.
[20] Tribunal psychiatrist (psychiatrist), email dated 21 May 2016.
[21] Tribunal member (community), submission dated May 2017.
[22] Terry Carney, David Tait, Julia Perry, Alikki Vernon & Fleur Beaupert, 2011, *Australian Mental Health Tribunals: space for fairness, freedom, protection & treatment?* Law and Justice Foundation of New South Wales, Adelaide, 295.
[23] Victoria Legal Aid, above n 3, 7.
[24] Practice Note 8 – Access to Documents in Mental Health Tribunal Hearings, paragraph 40.
[25] Section 8(2) provides that such an explanation 'must, whenever reasonable, be given both orally and in writing.' It is worth noting that Division 1 of Part 3 of the Act requires the service to give and explain a statement of rights to persons that sets out their rights under the Act while being assessed or receiving treatment in relation to their mental illness and which contains information as to the process by which a person will be assessed or receive treatment. Statement of rights documents are available in a range of community languages and contain information about Tribunal hearings. See: https://www2.health.vic.gov.au/mental-health/practice-and-service-quality/mental-health-act-2014-handbook/safeguards/statement-of-rights.
[26] Victoria Legal Aid, above n 3, 7.
[27] Ibid.
[28] Participants at the meeting of the aged persons mental health leaders' network on 28 June 2016.
[29] Ibid.
[30] This section draws from the submission of a Tribunal member (community), submission dated April 2017.
[31] Australian Mental Health Tribunals: *'Space for fairness, freedom, protection and treatment?'* Unpublished paper presented to the members of the former Mental Health Review Board in December 2009, 7.
[32] Ibid, 5.
[33] Tribunal member (legal), email dated 18 May 2016.
[34] Tribunal member (community), submission dated 20 May 2017.
[35] Tribunal member (psychiatrist), email dated 21 May 2016.
[36] Tribunal Advisory Group (TAG) and Tribunal member (psychiatrist), email dated 21 May 2016.
[37] Victoria Legal Aid, above n 3, 7-8.
[38] Ibid, 8.
[39] Victoria Legal Aid, above n 3, 6, TAG and participants at the meeting of the aged persons mental health leaders' network on 28 June 2016.
[40] See 3.1, 'Self-determination and supported decision making.'
[41] Victoria Legal Aid, above n 3, 6.
[42] See, also, 3.4 of this guide. Section 10(h) of the Act provides that an objective of the Act is 'to recognise the role of carers in the assessment, treatment and recovery of persons who have mental

illness.' Similarly, there are two mental health principles in section 11 that specifically recognise the important role of carers, namely: (k) carers (including children) for persons receiving mental health services should be involved in decisions about assessment, treatment and recovery, whenever this is possible; and (l) carers (including children) for persons receiving mental health services should have their role recognised, respected and supported.'

[43] Tribunal member (community), email dated 30 May 2016.

[44] Victoria Legal Aid, above n 3, 4.

[45] Domestic Violence Resource Centre Victoria (DVRCV), http://www.dvrcv.org.au/help-advice/elder-abuse-and-family-violence (as at 2 February 2017).

[46] Tribunal member (community), email dated 30 May 2016.

[47] Pillemer, K., Burnes, D., Riffin, C., & Lachs, M. S. (2016). Elder Abuse: Global Situation, Risk Factors, and Prevention Strategies. *The Gerontologist*, 56 (Suppl 2), 194-205, 197.

[48] Victoria Legal Aid, above n 3, 4.

[49] Adapted from case study in submission of Victoria Legal Aid, above n 3, 5.

[50] Tribunal member (community), submission dated April 2017.

[51] Mental Health Tribunal, *2015-16 Annual Report*, 30.

[52] Tribunal member (community), submission dated 20 May 2016.

[53] Tribunal member (legal), email dated 18 May 2016.

[54] Participant, meeting of the aged persons mental health leaders' network on 28 June 2016.

[55] Victoria Legal Aid, above n 3, 8.

[56] Ibid: 'The problems we note above risk being compounded in urgent applications for ECT. In our practice experience, it can be difficult for the Tribunal to remotely manage the competing views and interests of family members in the context of assessing capacity of the older person and whether less restrictive treatment options exist. Where family are seeking an outcome that the older person under treatment is opposing, the conduct of the hearing via video conference can significantly undermine the voice of the older person.'

[57] Mental Health Tribunal, *2015-16 Annual Report*, 10.

[58] Carney, above n 31, 5.

[59] Victoria Legal Aid, above n 3, 9.